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(2)

No. 08-632

Supreme Court, U.S.
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In The
Supreme Court of the United States

JANICE ABNER,

Petitioner,

v.

MOBILE INFIRMARY MEDICAL CENTER; BRIAN ARCEMENT, M.D.; DONALD KIRBY, M.D.; GREGORY McGEE, M.D.; TERRY WILSDORF, M.D.; PHILLIP TRAVIS, M.D.; MAHER SAHAWNEH, M.D.; JEFFERY ICKLER, M.D.; and MICHAEL O'DOWD, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of Alabama

BRIEF IN OPPOSITION

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QUESTION FOR REVIEW

Whether the Petitioner was deprived of her constitutional and statutory civil rights when the Supreme Court of Alabama denied her Petition for a Writ of Certiorari to the Alabama Court of Civil Appeals, which court had granted Respondents' motion to dismiss Petitioner's appeal from the ruling of the trial court which had dismissed her complaint against Respondents for the wrongful death of her decedent for alleged medical malpractice.

STATEMENT REGARDING COUNSEL FOR RESPONDENTS – Continued

In the courts below different Respondents were represented by different counsel. Inasmuch as the issues are identical for the Respondents and in order to conserve duplicative filings, for purposes of this Brief in Opposition, all of the Respondents are represented on this brief by:

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LIST OF PARTIES
and
STATEMENT PURSUANT TO RULE 29.6

Parties

Petitioner:

Janice Abner

Respondents:

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Jeffery K. Ickler, M.D.
J. Donald Kirby, M.D.
Gregory S. McGee, M.D.
J. Michael O'Dowd, M.D.
Maher N. Sahawneh, M.D.
Phillip S. Travis, M.D.
Terry Wilsdorf, M.D.
Mobile Infirmary Medical Center

Each of the Respondent-Physicians is engaged in the private practice of medicine either in a partnership or in a privately owned entity. There are no parent or public corporations involved with these entities.

The Respondent Mobile Infirmary Medical Center is the name under which Mobile Infirmary Association does business and it is a non-profit corporate entity. Infirmary Health Systems, Inc., a private corporation, is its parent corporation. There is no publicly held company that owns 10% or more of its stock.

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May It Please This Honorable Court:

STATEMENT OF THE FACTS

The Respondents submit that a brief background of proceedings in this case would perhaps be of benefit to the Court in its consideration of the Petition.

PROCEDURAL BACKGROUND

The Petitioner, together with her father, initially filed suit on July 20, 2004, in the United States District Court for the Southern District of Alabama against the Respondent hospital and eight (8) Respondent physicians alleging that their wife and mother, Lillian Abner, died on August 5, 2002 as the proximate result of medical malpractice by all of the Respondents.[1] That case (like this case) was not brought by the personal representative of Ms. Lillian Abner's estate as required by the laws of the State of Alabama under § 6-5-410, *Code of Alabama* (1975).

Motions to dismiss were filed by all the Respondents in the U.S. District Court case. Among the issues raised were (1) improper party plaintiff, (2) jurisdiction under the Medicare Act, and (3) sufficiency of the

[1] *Clarence Abner and Janice Abner v. Mobile Infirmary*, U.S. District Court, Southern District of Alabama, Civil Action No. 04-0476 (unreported) (Appendix I).

allegations of medical malpractice under Section 6-5-551 of the Code of Alabama. The District Court granted the motions to dismiss all the Respondents on February 2, 2005. (A copy of the District Court's order is appended hereto as Appendix I.) In its order the District Court noted that it did not have Federal jurisdiction because the claims asserted did not arise under the Medicare Act. The court noted that even if a federal question existed in the case, it was not brought by the proper parties. The court stated that:

> "Except where the decedent is a minor child, only the personal representative of a decedent may sue for wrongful death. (*Hatas v. Partin*, 175 So. 2d 759, 761 (Ala. 1965)."

It should also be noted that under Alabama law, a person must be a licensed attorney to represent a separate legal entity, such as a corporation or estate. *Ala. Code* § 34-3-6 (1975); *Ex parte Ghafary*, 738 So. 2d 778 (Ala. 1998).

Petitioner appealed the U.S. District Court ruling to the U.S. Court of Appeals for the Eleventh Circuit, and, by opinion dated August 31, 2005, the Court of Appeals affirmed the District Court.[2] The Petitioner took no further action in that particular case.

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[2] See *Abner v. Mobile Infirmary Hospital*, 149 Fed.Appx. 857, 2005 WL 2090635 (11th Cir. 2005). (The case was not selected for publication in the Federal Reporter.)

SUBJECT CASE

The Petitioner then, on July 31, 2006 (almost a year later), filed this lawsuit in the Circuit Court of Mobile County, Alabama against all of the same Respondents seeking recovery for damages for the alleged medical malpractice of the Respondents in causing the wrongful death of Ms. Lillian Abner. The cause of action for wrongful death under the Alabama Medical Malpractice statute would have arisen on August 5, 2002, the date of Ms. Lillian Abner's death, and the claim was barred by the two years statute of limitations of § 6-5-482(a) and § 6-5-410, *Code of Alabama* (1975). *Horn v. Citizens Hospital*, 425 So. 2d 1065 (Ala. 1982); *Benefield v. F. Hood Craddeck Clinic*, 456 So. 2d 52 (Ala. 1984).

All of the Respondents filed motions to dismiss this action in the state trial court on the grounds, among others, of (1) improper party plaintiff, (2) the statute of limitations of two years had expired, and (3) res judicata based on the previous U.S. District Court action. The Petitioner filed a response to the motions, and the Circuit Court of Mobile County, Alabama gave notice that the motions were set for oral argument on September 29, 2006. The Petitioner advised the trial judge that she would not appear in court for the hearing on the motions to dismiss. On September 29, 2006 and October 20, 2006, the trial judge, after considering arguments and the written

response of the Petitioner, entered final orders granting the motions of Respondents to dismiss the case.[3]

The Petitioner, on November 21, 2006, then appealed to the Supreme Court of Alabama, which Court transferred the case to the Alabama Court of Civil Appeals pursuant to § 12-2-7(6), *Code of Alabama* (1975). Motions to dismiss the appeal were subsequently filed by all the Respondents in the Alabama Court of Civil Appeals on the primary grounds that (1) the appeal was not timely filed; (2) the appeal was a nullity because (a) the Petitioner was not authorized, as a matter of law, to represent the interests of another's estate, *Ex parte Ghafary*, *supra*, and (b) the Petitioner was not a representative of the decedent's estate, § 6-5-410, *Code of Alabama* (1975); *Waters v. Hipp*, 600 So. 2d 981, 982 (Ala. 1992); (3) that the two year statute of limitations of the Alabama Wrongful Death Action had run, (4) the doctrine of res judicata applied, and (5) the appeal was frivolous. Ala.R.App.P. 2(a)(2)B. After the filing of briefs, the motions to dismiss were granted on January 9, 2007 and January 23, 2007 by the Alabama Court of Civil Appeals. (Appendices IV and V.) The Petitioner then filed a Petition for a Writ of Certiorari to the Supreme Court of Alabama. On August 8, 2008, the Supreme Court of Alabama denied the petition,

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[3] Copies of the orders of dismissal are appended hereto as Appendices II and III.

and the Petitioner filed the subject petition to this Honorable Court. (Appendix VI.)

ARGUMENT AGAINST GRANTING CERTIORARI

I

THE PETITIONER HAS NOT BEEN DENIED ANY OF HER CIVIL RIGHTS, AND THE PETITION FOR CERTIORARI FILED IN THE SUPREME COURT OF ALABAMA WAS DENIED ON APPLICABLE LEGAL GROUNDS.

Standing and Capacity to Sue

The questions of civil rights violations or of race of the parties have never been issues raised in the courts below. The Petitioner's lawsuit is one of medical malpractice in which the Petitioner alleges that the Respondents negligently treated her mother and thereby proximately caused her death. Section 6-5-410 of the *Code of Alabama* (1975) (commonly referred to as the "Alabama Wrongful Death" statute) provides in pertinent part:

> "(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omissions or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator

> or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death."
>
> * * *
>
> "(d) Such action must be commenced within two years from and after the death of the testator or intestate."

The Alabama Supreme Court has held that, except where the decedent is a minor child, only the personal representative of a decedent may sue for wrongful death. *Hatas v. Partin*, *supra*. The Petitioner does not dispute that she has never been appointed the personal representative of her deceased mother. She argues that there is no estate of her mother as there are no assets and, consequently, no need to open an estate in order to file this action. That is simply not the case as the statutory requirement of being the personal representative is a prerequisite to filing a wrongful death action in Alabama. Further, the cause of action itself (whether meritorious or not) became an asset of the estate. Inasmuch as the Petitioner was not the personal representative of the decedent's estate, the lawsuit was a nullity, and the court below properly dismissed the Petitioner's case. *Waters v. Hipp*, *supra*.

Further, the Alabama Supreme Court has held that only a licensed attorney can represent a separate legal entity, such as a corporation or an estate. *Ala. Code* § 34-3-6 (1975); *Ex parte Ghafary*, 738 So. 2d

778 (Ala. 1998). The Petitioner is not a licensed attorney.

These issues were also raised in the U.S. District Court case filed by the Petitioner against the same Respondents and were decided adverse to the petitioner. This decision was affirmed by the Eleventh Circuit Court of Appeals. (See Appendix I and footnote no. 2.)

The Petitioner did not have capacity or standing to bring this wrongful death action in the Circuit Court of Mobile County, Alabama.

Timeliness of Filing Suit

The Petitioner's cause of action, if any, arose on the date of Ms. Lillian Abner's death on August 5, 2002. The two year statute of limitations of § 6-5-410(d), *Code of Alabama* (1975) expired on August 5, 2004. The subject lawsuit was not filed until July 31, 2006, or almost four (4) years after the cause of action arose. Clearly, the statute of limitations barred the Petitioner's lawsuit. *Downtown Nursing Home, Inc. v. Pool*, 375 So. 2d 465 (Ala. 1979).

Timeliness of Appeal to the Alabama Supreme Court

The trial court entered a final order on September 29, 2006 granting the motions to dismiss the Petitioner's complaint as to the Respondents Mobile Infirmary Medical Center and physicians, McGee,

Ickler, Kirby, Arcement, Sahawneh and Wilsdorf. (Appendix II).

Pursuant to Rule 4 of the Alabama Rules of Appellate Procedure, the Petitioner was required to file a notice of appeal with the clerk of the court within 42 days of the entry of the Final Order of Dismissal. Thus, as to the named Respondents, Petitioner's appeal was not timely. A timely notice of appeal is necessary to invoke the jurisdiction of the Supreme Court of Alabama. *Altmayer v. Stremmel*, 891 So. 2d 305 (Ala. 2004), and Petitioner's appeal as to these Respondents was due to be dismissed on the grounds above.

Res Judicata

The current lawsuit involves the same parties and the same issues as the lawsuit filed by the Petitioner in the U.S. District Court. That case was decided against the Petitioner and in favor of the Respondents. The U.S. District Court case is res judicata to the case *sub judice*. *Neal v. Neal*, 856 So. 2d 766 (Ala. 2002); *Carroll v. Buttram*, 758 So. 2d 1097 (Ala. 1999).

Non-Applicability of 42 U.S.C. § 1981(a)

The Petitioner argues that her civil rights have been infringed upon in this case and suggests by her Petition that an inference can be drawn that the Alabama Supreme Court denied her Petition for a

Writ of Certiorari because she was of a different racial classification than the Respondents. There is no basis whatsoever in the records of this case to suggest such an inference. Clearly, there is nothing in the records of this case to suggest 42 U.S.C. § 1981(a), or U.S. Constitution Amendments X and XIV have in any manner been violated adverse to the Petitioner in this case.

Regardless of the race of a plaintiff in an Alabama wrongful death action, the lawsuit for that death can only be brought by the deceased's personal representative. The Petitioner, although acting *pro se*, must have known this from the opinion issued by the United States District Court in her first lawsuit filed for wrongful death against these Respondents. In its opinion, the Court specifically held: "Because plaintiffs are not the personal representative of decedent's estate, the case should be dismissed." (Appendix I.) However, even in view of this holding, the Petitioner re-filed her case in the state court (after the two year statute of limitations had run) without being named personal representative of the decedent.

Although the Alabama Wrongful Death Act has been held constitutional,[4] the Petitioner argues that

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[4] *Old Republic Union Ins. Co. v. Tillis Trucking Co.*, 124 F.3d 1258, 1997 U.S. App. Lexis 28422 (11th Cir. 1997); cert. denied, 523 U.S. 1047 (1998).

the court has discriminated against her, and others similarly situated in the State of Alabama. There is absolutely no substance to such an argument. Section 6-5-410, *Code of Alabama* (1975) states: "A personal representative may commence an action. . . ." The Petitioner simply did not qualify as a personal representative and is not the proper party to bring the action. In addition, the Alabama law provides that only a duly licensed attorney can represent a separate legal entity such as a corporation or an estate. In any event, the Alabama Statute of Limitations of two years (§ 6-5-410(d), *Code of Alabama* (1975)) had expired prior to the time the Petitioner filed this lawsuit in the state court and, in addition, the notice of appeal as to most of the Respondents was untimely.

There was no discrimination by the Alabama courts against the Petitioner, and there has been no violation of the Petitioner's constitutional rights. The Petitioner in the court below failed to comply with Alabama laws which are applicable to all citizens.

CONCLUSION

For the reasons stated, the Supreme Court of Alabama correctly denied the Petitioner's Petition for a Writ of Certiorari and the Petitioner was not discriminated against nor denied any of her constitutional rights. The premises considered, it is respectfully submitted that the Petitioner has not presented any compelling reason for the granting of her Petition for a Writ of Certiorari and the same should be denied.

Respectfully submitted,

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Appendix I – U. S. District Court Order Dated February 2, 2005 in Clarence Abner, et al. v. Mobile Infirmary, et al., Case No. 04-0476 .....App. 1

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Appendix I

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CLARENCE ABNER and JANICE ABNER,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 04-0476-CG-M**
MOBILE INFIRMARY, *et al.*,	)	
Defendants.	)	

ORDER

This matter is before the court on motions of defendants to dismiss (Docs. 7, 11, 14, 20, 22), plaintiffs' responses thereto (Docs. 17, 26, 29, 30), defendants' replies (Docs. 27, 31, 33) and plaintiffs' response to the replies (Doc. 40). The court finds that federal question jurisdiction does not exist in this case, and further, that the action was not brought by the proper parties. Therefore, defendants' motions to dismiss are due to be granted.

BACKGROUND

Plaintiffs, Clarence and Janice Abner, proceeding *pro se*, brought this action seeking damages for the wrongful death of Lillian Abner. The complaint asserts federal question jurisdiction arising from

defendants' alleged violation of a Medicare statute, 42 CFR § 35.15, which requires written consent of Medicare patients prior to performing certain medical procedures. The complaint also states that the action is also brought pursuant to Alabama Code § 22-8-1, which concerns consent requirements for medical treatment Plaintiffs are the husband and daughter of decedent, Lillian Abner. The personal representative of decedent's estate has not appeared in this action as a party plaintiff or in any other capacity. Defendants are the medical facility where decedent was a patient and the doctors who, according to plaintiffs, "either ordered diagnostic intervention, served as consultant, or ordered the treatment of decedent while a patient at Mobile Hospital, without the informed consent of decedent, nor gave notice thereof, or received authorization from the family . . . " (Doc. 17 at p.3).

DISCUSSION

Rule 8 of the Federal Rules of Civil Procedure requires that federal courts give pleadings a liberal reading in the face of a motion to dismiss. *GJR Investments, Inc. v. County of Escambia,* 132 F.3d 1359, 1369 (11th Cir. 1998). "This admonition is particularly true when the parties are proceeding *pro se.*" *Id.* As the Eleventh Circuit has noted:

> Courts do and should show a leniency to *pro se* litigants not enjoyed by those with the benefit of a legal education. *See, e.g., Powell v. Lennon,* 914 F.2d 1459, 1463 (11th

> Cir.1990). Yet even in the case of pro se litigants this leniency does not give a court license to serve as *de facto* counsel for a party, *see Hall v. Bellmon,* 935 F.2d 1106, 1109 (10th Cir.1991), or to rewrite an otherwise deficient pleading in order to sustain an action, *see Pontier v. City of Clearwater,* 881 F.Supp. 1565, 1568 (M.D.Fla.1995).

GJR Investments Inc. v. County of Escambia, Fla., 132 F.3d 1359, 1369 (11th Cir. 1998). Thus, while plaintiffs' complaint should be read liberally, the court will not fabricate a jurisdictional basis that is not apparent from the complaint.

Defendants assert that plaintiffs have not established federal question jurisdiction. "Federal courts are courts of limited jurisdiction." *Burns v. Windsor Co.,* 31 F.3d 1092, 1095 (11th Cir. 1994).

> Under the federal question jurisdiction statute, 28 U.S.C. § 1331, a district court has subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Whether a claim arises under federal law for purposes of 28 U.S.C. § 1331 is generally determined by the well-pleaded complaint rule, "which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiffs properly pleaded complaint" *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987). A well-pleaded complaint presents a federal question where it "establishes

> either that federal law creates the cause of action or that the plaintiffs right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28, 103 S.Ct. 2841, 2856, 77 L.Ed.2d 420 (1983).

Smith v. GTE Corp., 236 F.3d 1292, 1310 (11th Cir. 2001). Plaintiffs assert that this court has federal question jurisdiction because the case is brought under the Medicare Act. However, the complaint does not seek benefits under the Medicare Act. The complaint seeks "compensatory and general damages" for alleged "physical injury caused by misdiagnosis and wrongful suffering and immediate death due to misdiagnosis and negligence leading to said injury." The court finds that the claims do not arise under the Medicare Act, nor is plaintiffs' right to relief necessarily dependant on the resolution of a substantial question of federal law.

In *Ardary v. Aetna Health Plans of California, Inc.*, 98 F.3d 496 (9th Cir. 1996) certiorari denied (1997) 520 U.S. 1251, 117 S.Ct. 2408, 138 L.Ed.2d 174 (cited by both plaintiffs and defendants), the plaintiffs brought an action seeking compensatory and punitive damages for the improper denial of emergency medical services and misrepresentation of managed care to a Medicare patient. The Court found that the claims did not arise under the Medicare Act and that the action was improperly removed to federal court for the following reasons:

> First, the Ardary's complaint does not "include any claims in which 'both the standing and the substantive basis for the presentation' of the claims" is the Act. *Heckler v. Ringer*, 466 U.S. 602, 615, 104 S.Ct. 2013, 2021-22, 80 L.Ed.2d 622 (1984) (citing *Weinberger v. Salfi*, 422 U.S. 749, 760-61, 95 S.Ct. 2457, 2464-65, 45 L.Ed.2d 522 (1975)) (emphasis added). The Ardarys seek general and punitive damages on the basis of negligence, intentional and/or negligent infliction of emotional distress, intentional and/or negligent misrepresentation, and professional negligence. The standing for these six claims are state common law theories and not the Act. Second, the state law claims are not "inextricably intertwined" with the denial of benefits. Although the Ardarys concede that their wrongful death complaint is "predicated on" Arrowest's failure to authorize the airlift transfer, the claims are not "inextricably intertwined" because the Ardarys are at bottom not seeking to recover benefits. *Ringer*, 466 U.S. at 614, 104 S.Ct. at 2021.

Ardary, 98 F.3d at 499-500. The claims asserted and damages sought by plaintiffs in the instant case are similar to the claims asserted and damages sought in *Ardary*.

Similarly, in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229 (1986) (also cited by both plaintiffs and defendants), the Supreme Court held that the district court did not have jurisdiction under 28 U.S.C. § 1331 where the plaintiff

alleged a state tort claim but pointed to federal law as evidence of the standard of care. Given that there was no private right of action under the federal law in question, the Court examined whether a substantial question of law was implicated. It held that "the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system." *Id.* at 814, 106 S.Ct 3229. The Court found no federal subject matter jurisdiction.

The Eleventh Circuit, following the rational of *Merrell Dow,* found no federal subject-matter jurisdiction over a discrimination claim based upon a breach of a duty created under the Americans with Disabilities Act. *Jairath v. Dyer,* 154 F.3d 1280 (11th Cir. 1998) (again cited by both sides). There the appeals court found that the district court lacked subject-matter jurisdiction over the case because the claims did not "arise under" federal law. The plaintiff had no standing to pursue the only federal private cause of action available under the ADA (i.e., for injunctive relief). *Id.*, at 1284.

In the instant case, as in *Ardary*, *Merrell Dow* and *Jairath*, plaintiffs do not have standing to pursue a private cause of action under the federal statute in question. The Medicare Act provides for the Office of Inspector General to impose penalties and assessments, but does not create a private cause of action. *See* 42 C.F.R. § 1003.100 *et seq.* Such penalties and assessments may be judicially reviewed under certain circumstances. *See* 42 C.F.R. § 1003.127. However, in

the instant case, plaintiffs do not seek review of penalties or assessments and there is no allegation that any penalties or assessments were even imposed. Therefore, the court finds that plaintiffs' causes of action do not arise under the Medicare Act.

Plaintiffs also raise the doctrine of *res ipso loquitur*, however the court finds the doctrine inapplicable to the jurisdictional determination in this case. Evidence that defendants were negligent does not provide federal jurisdiction.

Plaintiffs also mention the *Rooker-Feldman* doctrine which precludes federal review by district courts when a state court judgment is challenged by a party to the state court action. *Johnson v. De Grandy,* 512 U.S. 997, 1005, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). That doctrine is also inapplicable as there is no state court judgment to be reviewed in this case.

Plaintiffs further argue that their constitutional rights were violated, but it is not clear to what constitutional rights they refer. Plaintiffs assert that their claims are premised on the victim's Fourteenth Amendment right to due process. However, it is unclear what due process rights could have been violated. The Due Process Clause of the 14th Amendment protects individuals against governmental action that either " 'shocks the conscience,' *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct, 205, 96 L.Ed. 183 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v. Connecticut,* 302 U.S. 319, 325-326, 58 S.Ct. 149, 82 L.Ed. 288

(1937)." *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The defendants in this case consist of a private, non-profit hospital and private individuals. The court is not aware of any constitutional right that would be impinged by defendants' alleged action or inaction which is the subject of the instant complaint. The court finds mere reference by the plaintiffs to due process violations and to constitutional violations is insufficient to assert a federal claim. *See Adams v. Robertson,* 520 U.S. 83, 89, n. 3, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (per curiam) (concluding that "passing invocations of 'due process'" that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a federal claim was presented"); *Webb v. Webb,* 451 U.S. 493, 496, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) (finding a reference to "full faith and credit" insufficient to raise a federal claim without a reference to the U.S. Constitution or to any cases relying on it); *New York Central R. Co. v. New York,* 186 U.S. 269, 273, 22 S.Ct. 916, 46 L.Ed. 1158 (1902) ("[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth"); *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655, 17 S.Ct. 709, 41 L.Ed. 1149 (1897) (a party's intent to invoke the Federal Constitution must be unmistakably" declared, and the statutory requirement is not met if "the purpose of the party to assert a Federal right is left to mere inference").

Even if federal question jurisdiction existed in this case, defendants argue that this case has not been brought by the proper parties. Alabama's wrongful death statute, provides that "[a] personal representative may commence an action and recover such damages . . . for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused . . . " ALA. CODE § 6-5-410. Except where the decedent is a minor child, only the personal representative of a decedent may sue for wrongful death. *Hatas v. Partin* 175 So.2d 759, 761 (Ala. 1965). Defendants assert that under Alabama law, a person must be a licensed attorney to represent a separate legal entity, such as a corporation or estate. *See* ALA. CODE § 34-3-6; *Ex parte Ghafary,* 738 So.2d 778 (Ala. 1998). Plaintiffs' only response is that they diligently sought legal representation for the action but were unable to find an attorney to represent the decedent. Because plaintiffs are not the personal representative of decedent's estate, the case should be dismissed. *See Waters v. Hipp,* 600 So.2d 981, 982 (Ala. 1992) ("One who sues under this section without having been appointed executor or administrator does not qualify under this section as a personal representative, and the suit is a nullity." citations omitted).

Plaintiff requests additional time to amend his complaint and to join additional parties. (Doc. 40). However, there has been no showing that an amendment would cure the jurisdictional defects in this

case. The court finds it would be futile to allow plaintiffs to amend their complaint and/or join additional parties.

CONCLUSION

For the reasons stated above, defendants' motions to dismiss (Docs. 7, 11, 14, 20, 22) are **GRANTED** and this case is hereby **DISMISSED**.

DONE and ORDERED this 2nd day of February, 2005.

/s/ Callie V. S. Granade
CHIEF UNITED STATES
DISTRICT JUDGE

Appendix II

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

JANICE ABNER,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION**
MOBILE INFIRMARY MEDICAL CENTER, et al.,	)	**NO. CV-06-2673**
Defendants.	)	

FINAL ORDER OF DISMISSAL

The Court convened a hearing on September 29, 2006, on the following Motions:

1. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim filed by Defendants Gregory McGee and Jeffery Ickler;

2. Motion of Defendants Donald Kirby, M.D., Terry Wilsdorf, M.D., Maher Sahawneh, M.D. and Brian Arcement, M.D. to Dismiss; and

3. Defendant Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center's Motion to Dismiss.

The Court had notified Plaintiff of the date and time of this hearing, and plaintiff had spoken to the Court by telephone on two occasions regarding the hearing. In her most recent communication to the Court, the Plaintiff stated that she would not attend the hearing for these Motions to Dismiss. Defense counsel advised

the Court during the hearing that Plaintiff had also spoken to two defense counsel, that one of the defense counsel had sent a notice of the hearing schedule to Plaintiff and that Plaintiff had also told defense counsel that she would not attend the hearing. Plaintiff had filed a response to the Motions to Dismiss which the Court received on September 28, 2006 and read and considered before ruling on the pending Motions to Dismiss. Having considered oral argument of counsel and the response of Plaintiff, it is hereby ORDERED, ADJUDGED and DECREED that the Motions to Dismiss referenced above are GRANTED. The Court has determined that there is no just reason to delay an entry of final judgment and the Court does hereby direct entry of final judgment of dismissal of all claims against Gregory McGee, Jeffery Ickler, Donald Kirby, M.D., Terry Wilsdorf, M.D., Maher Sahawneh, M.D., Brian Arcement, M.D., and Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center.

DONE this 29th day of September, 2006.

/s/ _____
Judge Herman Thomas
Circuit Judge

COPY TO: A. Danner Frazer, Esq.
Ms. Janice Abner (Certified Mail)
Patrick Shegon, Esq.
Cifford Brady, Esq.
W. Boyd Reeves, Esq.

Appendix III

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

JANICE ABNER,	§	
Plaintiff,	§	
V.	§	
MOBILE INFIRMARY MEDICAL CENTER;	§	
BRIAN ARCEMENT, M.D.;	§	
JEFFERY ICKLER, M.D.;	§	**CASE NO.:**
DONALD KIRBY, M.D.;	§	**CV-06-2673**
GREGORY McGEE, M.D.;	§	
MICHAEL O'DOWD, M.D.;	§	
PHILLIP TRAVIS, M.D.;	§	
MAHER SAHAWNAH, M.D.;	§	
TERRY WILSDORF, M.D., et al.,	§	
Defendants.	§	

ORDER OF DISMISSAL

This mater comes before the Court on the motion to dismiss filed by defendants, Michael O'Dowd, M.D. and Phillip Travis, M.D. These defendants raised grounds for dismissal like those of the co-defendants who were all dismissed by order of this Court dated September 29, 2006. A hearing on the motion to dismiss filed by defendants O'Dowd and Travis was held on October 20, 2006. The Court notes that the plaintiff was given sufficient notice of the date and time of this hearing, but the plaintiff did not attend.

The Court has received the plaintiff's reply in opposition to these defendants' motion to dismiss and has read and considered same before ruling on the pending motion to dismiss. Having considered oral argument of counsel and the response of plaintiff, it is hereby **ORDERED, ADJUDGED and DECREED** that the motion to dismiss on behalf of defendants O'Dowd and Travis is hereby **GRANTED**. The Court has determined that there is no just reason to delay an entry of final judgment and the Court does hereby direct entry of final judgment of dismissal with prejudice of all claims against defendants, Michael O'Dowd, M.D. and Phillip Travis, M.D.

DONE this 20th day of October, 2006.

/s/ _____
HERMAN THOMAS
Circuit Judge

cc: Ms. Janice Abner
Patrick M. Shegon, Esq.
A. Danner Frazer, Esq.
W. Boyd Reeves, Esq.
Clifford Brady, Esq.

Appendix IV

STATE OF ALABAMA
COURT OF CIVIL APPEALS

[SEAL]

John H. Wilkerson, Jr.
Clerk

300 Dexter Avenue
Montgomery, AL 36104-3741

Rebecca C. Oates
Assistant Clerk

Phone (334) 242-4093
Fax (334) 242-4017

January 9, 2007

2060218

Janice Abner v. Mobile Infirmary Medical Center et al. (Appeal from Mobile Circuit Court: CV 06-2673)

You are hereby notified that the following action was taken in the above cause, by the Court of Civil Appeals

Motions to dismiss filed by appellees Gregory McGee, Jeffery Ickler, Donald Kirby, M.D., Terry Wilsdorf, M.D., Maher Sawawneh, M.D., Brian Arcement, M.D., and Mobile Infirmary Association d/b/a/ Mobile Infirmary Medical Center are granted. They are dismissed as appellees in this appeal.

/s/ John H. Wilkerson, Jr.
John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals

Appendix V

STATE OF ALABAMA
COURT OF CIVIL APPEALS

[SEAL]

John H. Wilkerson, Jr.
Clerk

300 Dexter Avenue
Montgomery, AL 36104-3741

Rebecca C. Oates
Assistant Clerk

Phone (334) 242-4093
Fax (334) 242-4017

January 23, 2007

2060218

Janice Abner v. Mobile Infirmary Medical Center et al. (Appeal from Mobile Circuit Court: CV 06-2673)

IT IS ORDERED, by the Court of Civil Appeals that the appeal in the above styled cause be, and the same is hereby Dismissed On Motion Of Appellees, Michael O'Dowd, M.D., and Phillip Travis, M.D. – No Opinion.

IT IS FURTHER ORDERED that the appellant and sureties for the costs of appeal, pay the costs of appeal in the court below.

I, John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 23rd day of January, 2007.

/s/ John H. Wilkerson, Jr.
John H. Wilkerson, Jr.

Appendix VI

IN THE SUPREME COURT OF ALABAMA

[SEAL]

August 8, 2008

1060813

Ex parte Janice Abner, PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Janice Abner v. Mobile Infirmary Medical Center et al.) (Mobile Circuit Court: CV 06-2673; Civil Appeals : 2060218).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

PARKER, J. – Cobb, C.J., and See, Woodall, and Smith, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 8th day of August, 2008.

/s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama